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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM JIBSON,

Appellant,

v.

WHITE CLOUD EDUCATION ASSOCIATION,

Appellee.

On Appeal From the Court of Appeals of Michigan

JURISDICTIONAL STATEMENT

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May 7, 1984

50 pp

QUESTION PRESENTED

Is a State's public-sector agency-shop statute repugnant to the First Amendment's ban on laws coercing political and ideological conformity where the statute, as applied by the State's courts, licenses the union — prior to any adjudication of the amount of a constitutionally permissible agency-shop fee — to spend a dissenting employee's compulsory fees for political and ideological purposes unrelated to collective bargaining?

PARTIES

In addition to the parties named in the caption, the Board of Education of the White Cloud Public Schools was a party to the proceedings in the Michigan Court of Appeals. The Clerk of this Court has been notified pursuant to Supreme Court Rule 10.4 that the Board of Education has no interest in the outcome of the appeal. Therefore, as the constitutionality of a statute of the State of Michigan is drawn in question in the appeal, and neither the State nor any agency, officer, or employee thereof is a party to the appeal, it is noted that 28 U.S.C. § 2403(b) may be applicable.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
THE FEDERAL QUESTION IS SUBSTANTIAL	8
CONCLUSION	18
APPENDIX A: Opinion and Judgment of the Michigan Court of Appeals	1a
APPENDIX B: Opinions and Orders of the Circuit Court for the County of Newaygo	11a
APPENDIX C: Order of the Michigan Court of Appeals Denying Rehearing	20a
APPENDIX D: Order of the Michigan Supreme Court Denying Leave to Appeal	22a
APPENDIX E: Notice of Appeal	24a

TABLE OF AUTHORITIES

Cases	Page
Abood v. Detroit Board of Education, 431 U.S. 209 (1977)	*passim*
Ball v. City of Detroit, 84 Mich. App. 383, 269 N.W.2d 607 (1978)	7, 10, 11
Beck v. Communications Workers, 106 L.R.R.M. 2323 (1981), *further proceedings*, 112 L.R.R.M. 3069 (D. Md. 1983)	15
Cantwell v. Connecticut, 310 U.S. 296 (1940)	17
Carroll v. President of Princess Anne, 393 U.S. 175 (1968)	17
Cort v. Ash, 422 U.S. 66 (1975)	16
Detroit Board of Education v. Parks, 417 Mich. 268, 335 N.W.2d 641 (1983)	8
Ellis v. Railway Clerks, 88 Lab. Cas. ¶ 11,986 (S.D. Cal. 1980), *aff'd in part, rev'd in part*, 685 F.2d 1065 (9th Cir. 1982), *aff'd in part, rev'd in part*, No. 82-1150 (U.S. Apr. 25, 1984)	*passim*
Elrod v. Burns, 427 U.S. 347 (1976)	16, 17

Page

Galda v. Bloustein, 686 F.2d 159 (3d Cir. 1982) 11

Garden City School District, 1978 Mich. Empl. Rel. Comm'n Lab. Op. 1145 (Oct. 9, 1978), *reh'g denied*, 1978 Mich. Empl. Rel. Comm'n Lab. Op. 1282 (Nov. 28, 1978) 7, 11

Hickman v. Taylor, 329 U.S. 495 (1947) 14

Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979) 3

Kempner v. Local 1077, State, County & Municipal Employees, 126 Mich. App. 452, 337 N.W.2d 354 (1983) 11

Lehnert v. Ferris Faculty Association, 556 F. Supp. 316 (W.D. Mich. 1983) 14

Machinists v. Street, 367 U.S. 740 (1961) 9, 14

Railway Clerks v. Allen, 373 U.S. 113 (1963) .. 9, 12, 14

Robbinsdale Education Association v. Robbinsdale Federation of Teachers Local 872, 307 Minn. 96. 239 N.W.2d 437, *vacated & remanded for further consideration sub nom. Threlkeld v. Robbinsdale Federation of Teachers, Local 872*, 429 U.S. 880 (1976), *reinstated*, 316 N.W.2d 551 (Minn.), *appeal dismissed*, 103 S. Ct. 24 (1982) 10

Page

Robinson v. New Jersey, 547 F. Supp. 1297 (1982), *further proceedings*, 565 F. Supp. 942 (D.N.J. 1983) 11, 15

Schneider v. Colegio de Abogados de Puerto Rico, 565 F. Supp. 963 (D.P.R. 1983) 11

School Committee v. Greenfield Education Association, 385 Mass. 70, 431 N.E.2d 180 (1982) 11

Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969) 17

Standard Oil Co. v. Johnson, 316 U.S. 481 (1942) ... 3

White Cloud Education Association v. Board of Education, 101 Mich. App. 309, 300 N.W.2d 551 (1980) ..... *passim*

Constitutional and Statutory Provisions

United States Constitution:
First Amendment ..... *passim*
Fourteenth Amendment 1, 3, 6

Michigan Public Employment Relations Act
Mich. Comp. Laws § § 423.201-16 (1979) 5
Mich. Comp. Laws § 423.210(1)(c), (2) .... *passim*

28 U.S.C. § 1257(2) 3

28 U.S.C. § 2403(b) i

Miscellaneous *Page*

I H. Gilmore, *Michigan Civil Procedure Before Trial* (2d ed. 1982 Supp.) 16

Levinson, *After Abood: Public Sector Union Security and the Protection of Individual Public Employee Rights*, 27 Am. U. L. Rev. 1 (1977) 16

Mich. Gen. Ct. R. 521 14

Sup. Ct. R. 10.4 i

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WILLIAM JIBSON,

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WHITE CLOUD EDUCATION ASSOCIATION,

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On Appeal From the Court of Appeals of Michigan

JURISDICTIONAL STATEMENT

Appellant William Jibson appeals from that part of the final judgment of the Michigan Court of Appeals which holds that Section 10(1)(c) and (2) of the Michigan Public Employment Relations Act, Mich. Comp. Laws § 423.210(1)(c), (2) (1979), as interpreted by the court of appeals, is not repugnant to the First Amendment to the Constitution of the United States, made applicable to the states by the Fourteenth Amendment.

OPINIONS BELOW

The published opinion of the Michigan Court of Appeals, which appears in Appendix A, *infra*, is reported as *White Cloud Education Association v. Board of Education*, 101 Mich. App. 309, 300 N.W.2d 551 (1980). The order of the

Supreme Court of Michigan entered on February 7, 1984, denying appellant Jibson's application for leave to appeal is unreported and is set forth in Appendix D, *infra*. The opinion of the Circuit Court for the County of Newaygo on cross-motions for summary judgment also is unreported and appears in Appendix B, *infra*.

JURISDICTION

This is an appeal from a final judgment entered by the Michigan Court of Appeals affirming a trial court judgment directing the Board of Education of the White Cloud Public Schools ("the Board") to discharge appellant William Jibson, a tenured teacher, for failure to pay agency-shop fees to appellee White Cloud Education Association ("the Union"). In his intervening answer to the complaint brought against the Board by the Union and throughout the proceedings in the state courts, Mr. Jibson drew into question the validity of the Michigan public-sector agency-shop statute on the ground of its repugnance to the First Amendment to the Constitution of the United States, if the statute were interpreted to require him to give the Union unrestricted possession of his fees before the constitutional validity of their amount had been adjudicated. The court of appeals rejected this argument and held that Mr. Jibson must pay the contested fees to the Union as a prerequisite to adjudication of their amount, implicitly holding the statute constitutional as applied.

The judgment sought to be reviewed was deemed to have been entered on November 4, 1980, as part of the opinion of the Michigan Court of Appeals. App. A, *infra*, p. la. Mr. Jibson's timely application for rehearing on the federal constitutional issue was denied by the court of appeals on February 11, 1981. App. C, *infra*, p. 20a. The Supreme

Court of Michigan denied his timely application for leave to appeal by an order entered on February 7, 1984. App. D, *infra*, p. 22a. A notice of appeal to this Court was filed on March 30, 1984. App. E, *infra*, p. 24a.

This court has jurisdiction of this appeal by virtue of 28 U.S.C. § 1257(2). Because the Michigan Supreme Court denied Mr. Jibson's application for leave to appeal, the court of appeals is the highest court of Michigan in which a decision could be had. *Abood v. Detroit Board of Education*, 431 U.S. 209, 216 (1977). Jurisdiction lies under 28 U.S.C. § 1257(2) where a state court rejects a contention that a state statute as applied is repugnant to the Constitution of the United States. *E.g., Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 440-41 (1979); *Standard Oil Co. v. Johnson*, 316 U.S. 481, 482-83 (1942).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law * * * abridging the freedom of speech * * * or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> nor shall any State deprive any person of life, liberty, or property, without due process of law * * *.

The pertinent portion of the challenged state statute,

Mich. Comp. Laws § 423.210(1)(c), (2) (1979), reads as follows:

> (1) It shall be unlawful for a public employer or an officer or agent of a public employer * * * (c) to discriminate in regard to hire, terms or other conditions of employment in order to encourage or discourage membership in a labor organization: Provided further, That nothing in this act or in any law of this state shall preclude a public employer from making an agreement with an exclusive bargaining representative as defined in section 11 to require as a condition of employment that all employees in the bargaining unit pay to the exclusive bargaining representative a service fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative * * *.
>
> (2) It is the purpose of this amendatory act to reaffirm the continuing public policy of this state that the stability and effectiveness of labor relations in the public sector require, if such requirement is negotiated with the public employer, that all employees in the bargaining unit shall share fairly in the financial support of their exclusive bargaining representative by paying to the exclusive bargaining representative a service fee which may be equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative.

STATEMENT OF THE CASE

Appellant William Jibson is a tenured teacher employed by the Board of Education of the White Cloud Public

Schools. Appellee White Cloud Education Association is a labor organization which is Mr. Jibson's exclusive bargaining representative under the Michigan Public Employment Relations Act ("PERA"), Mich. Comp. Laws § § 423.201-16 (1979). Mr. Jibson is not a member of the Union.

The Board and the Union entered into a collective bargaining agreement which included an "agency-shop" clause, authorized by PERA § 10(1)(c) and (2), Mich. Comp. Laws § 423.210(1)(c), (2) (1979). This provision required nonmember teachers to pay to the Union a "service fee" equivalent to membership dues as a condition of employment. When Mr. Jibson did not pay the service fee, the Union filed charges asking the Board to hold a tenure hearing and discharge him. Citing a decision of the Michigan Tenure Commission, which had held that failure to pay agency-shop fees did not constitute "reasonable and just cause" for discharge of a tenured teacher, the Board refused to hold a hearing or terminate Mr. Jibson's employment.

To enforce its demand that the teacher be discharged, the Union sued the Board in the Circuit Court for the County of Newaygo. The Board defended its conduct on tenure act and state constitutional grounds. On April 25, 1979, the circuit court granted summary judgment for the Union. The court rejected the Board's defenses and ordered the Board to fire Mr. Jibson if it determined that he in fact had not paid the fee. App. B, *infra*, pp. 16a-17a.

On May 14, 1979, the Board moved for a new trial and amended judgment on the ground that it just had been informed that Mr. Jibson was asserting First-Amendment rights under *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). Mem. of Points & Authorities in Support of Defendants' Motion for a New Trial & Amendment of

Judgment (filed May 14, 1979), *particularly* at 4 n.l. Mr. Jibson then asked to intervene as a defendant and submitted an answer. He alleged his objection to use of the service fee for purposes other than collective bargaining, contract administration, and grievance adjustment, and his willingness to escrow the full fee pending a judicial determination of the amount of a constitutionally permissible fee. Answer at 2 (filed May 25, 1979). Mr. Jibson also asserted that the agency-shop provisions of the collective agreement

> insofar as they require the Intervenor to pay an agency fee which is the equivalent of union dues, absent a showing by the Association that an equivalency fee represents the Intervenor's *pro rata* share of the Association's costs of collective bargaining, contract administration and grievance adjustment are * * * in violation of Intervenor's First * * * and Fourteenth Amendment rights under the United States Constitution.

Id. at 3-4.

On June 19, 1979, the circuit court allowed Mr. Jibson to intervene, but ruled that it would hold a hearing pursuant to *Abood* only if he first paid the contested service fee to the Union. Because Mr. Jibson was unwilling to do so, the court denied the Board's motion for a new trial and ordered the Board to discharge him without any hearing. App. B, *infra*, pp. 18a-19a.

Both the Board and Mr. Jibson appealed. In his brief and at oral argument, in addition to raising state tenure act questions, Mr. Jibson pursued his federal constitutional claim. He contended that his First-Amendment rights were violated by the requirement that he pay the disputed fees to the Union as a prerequisite to obtaining a judicial determi-

nation of the constitutionality of their amount. Brief of Intervenor Defendant-Appellant William Jibson at 29-33 (filed Sept. 4, 1979). He did not specifically assert that the Michigan public-sector agency-shop statute was repugnant to the First Amendment, because, after the decision in *Abood*, the Michigan Court of Appeals and the Michigan Employment Relations Commission previously had applied the statute to permit dissenting employees to escrow service fees pending union proof of the constitutionally chargeable amount. *See Ball v. City of Detroit*, 84 Mich. App. 383, 397, 269 N.W.2d 607, 613 (1978); *Garden City School District*, 1978 Mich. Empl. Rel. Comm'n Lab. Op. 1145, 1156-58 (Oct. 19, 1978), *reh'g denied*, 1978 Mich. Empl. Rel. Comm'n Lab. Op. 1282 (Nov. 28, 1978).

In an opinion and judgment entered November 4, 1980, the Michigan Court of Appeals affirmed the circuit court's order that the Board discharge Mr. Jibson. App. A, *infra*, p. 8a. The court of appeals held that the provisions of Michigan's tenure act are inapplicable to discharges pursuant to Section 10(1)(c) of PERA. *Id.*, pp. 1a-6a. It also applied the agency-shop statute to require an objecting employee to pay his service fees to the union before seeking an adjudication of the amount to which the union constitutionally is entitled. Declining to follow *Ball* and rejecting Mr. Jibson's constitutional arguments for escrow, the court ruled that "the employee's First Amendment rights can be adequately safeguarded if the disputed fee is paid to the union and the employee immediately files suit for declaratory judgment" under a court rule which authorizes an expedited hearing. *Id.*, pp. 6a-8a.

Because the specific question of whether a dissenting employee's First-Amendment rights can be protected adequately by a post-payment declaratory judgment action had

been neither briefed nor argued by the parties, Mr. Jibson filed a timely application for rehearing on that narrow issue. Intervenor Defendant-Appellant's Application for Rehearing (filed Nov. 21, 1980). The court of appeals denied that application on February 11, 1981. App. D, *infra*, pp. 20a-21a. Then Mr. Jibson timely applied for leave to appeal to the Michigan Supreme Court on both the tenure act and constitutional issues. His application specifically contended that PERA § 10(1)(c) and (2) as applied by the lower courts is repugnant to the First Amendment, because it permits the Union to spend fees for constitutionally impermissible purposes before the validity of their amount has been adjudicated. Application for Leave to Appeal from Decision of Court of Appeals at 4-5; Brief in Support thereof at 1-2, 7-17 (filed Mar. 3, 1981).

On September 10, 1981, the Michigan Supreme Court ordered the application for leave to appeal held in abeyance pending a decision in another case involving only the tenure act issues. That decision was rendered on June 27, 1983, holding the tenure act wholly inapplicable to agency-shop discharges. *Detroit Board of Education v. Parks*, 417 Mich. 268, 335 N.W.2d 641 (1983). An order denying leave to appeal in this case, because the court was "not persuaded that the questions presented should be reviewed," was entered on February 7, 1984. App. D, *infra*, pp. 22a-23a.

THE FEDERAL QUESTION IS SUBSTANTIAL

The question this appeal presents is one this Court answered for the first time on April 25, 1984, in *Ellis v. Railway Clerks*, No. 82-1150 (U.S. Apr. 25, 1984). *Ellis* establishes that the ruling of the Michigan Court of Appeals on this question is erroneous.

Abood v. Detroit Board of Education, 431 U.S. 209 (1977), addressed the constitutionality on its face of the public-sector agency-shop statute at issue here. The Court held that an agency-shop agreement "[t]o compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests," but is constitutional "insofar as the service charges are applied to collective-bargaining, contract administration, and grievance adjustment purposes." *Id.* at 222-32.

However, the Court also concluded that, if the agency-shop fee is not so limited and an objecting employee's compulsory monies are used "for political and ideological purposes unrelated to collective bargaining," the arrangement violates the First Amendment. *Id.* at 232-37. Because the *Abood* appeal arose from a judgment on the pleadings, the Court addressed the issue of the appropriate remedy only in *dicta*, leaving this important question for resolution in subsequent litigation. *Id.* at 236-42. Justice Stevens emphasized that this disposition of *Abood* reserved the very question presented on this appeal:

> By joining the opinion of the Court, including its discussion of possible remedies, I do not imply — nor do I understand the Court to imply — that the remedies described in *Machinists* v. *Street*, 367 U.S. 740 [(1961)], and *Railway Clerks* v. *Allen*, 373 U.S. 113 [(1963)], would necessarily be adequate in this case or in any other case. More specifically, the Court's opinion does not foreclose the argument that the Union should not be permitted to exact a service fee from nonmembers without first establishing a procedure which will avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to

collective bargaining.

Id. at 244 (Stevens, J., concurring).

The issue anticipated by Justice Stevens — whether the First Amendment permits agency-shop arrangements which do not avoid the temporary use of objecting employees' fees for political and ideological purposes — then arose in several lower courts. The results were conflicting.

Ironically, the first lower court to confront the post-*Abood* question of the constitutionality of coerced political and ideological "loans" was the Michigan Court of Appeals.[1] In *Ball v. City of Detroit*, 84 Mich. App. 383, 397, 269 N.W.2d 607, 613 (1978), the court said:

> [W]e agree with plaintiffs that allowing the union the use of funds prior to a judicial determination subjects nonmembers to the risk that their fees may be used, even temporarily, for activities to which they are opposed. Because fundamental First Amendment rights are at stake, we believe the proper solution is to require nonmembers to pay service fees into an escrow account. While we recognize this works somewhat of a hardship on the union because temporarily it will be unable to collect even the portion of service fees to which it is entitled, that hardship is outweighed by the possibility that First Amendment rights will be violated.

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[1] In a pre-*Abood* decision, the Minnesota Supreme Court had held that procedural due process entitles an objecting employee to an injunction against the use of "fair share" fees until the validity of their amount is adjudicated. *Robbinsdale Educ. Ass'n v. Robbinsdale Fed'n of Teachers Local 872*, 307 Minn. 96, 100-09, 239 N.W.2d 437, 440-45, *vacated & remanded for further consideration sub nom. Threlkeld v. Robbinsdale Fed'n of Teachers, Local 872*, 429 U.S. 880 (1976), *reinstated*, 316 N.W.2d 551 (Minn.), *appeal dismissed*, 103 S. Ct. 24 (1982).

This holding was followed by the Michigan Employment Relations Commission in *Garden City School District*, 1978 Mich. Empl. Rel. Comm'n Lab. Op. 1145 (Oct. 19, 1978), *reh'g denied*, 1978 Mich. Empl. Rel. Comm'n Lab. Op. 1282 (Nov. 28, 1978). *Garden City* applied PERA § 10(1)(c) in light of *Abood* and *Ball* to prohibit the discharge of objecting employees for failure to pay, except into escrow, fees which had not yet been adjudicated to be constitutionally permissible in amount. *Id.* at 1156-58. *Ball* also was followed by courts in other jurisdictions. *Robinson v. New Jersey*, 547 F. Supp. 1297, 1321-22 (1982) (granting preliminary injunction), *further proceedings*, 565 F. Supp. 942, 948-49 (D.N.J. 1983); *School Committee v. Greenfield Education Association*, 385 Mass. 70, 83-85, 431 N.E.2d 180, 189 (1982); *see Galda v. Bloustein*, 686 F. 2d 159, 167-69 (3d Cir. 1982); *Schneider v. Colegio de Abogados de Puerto Rico*, 565 F. Supp. 963, 976-77 (D.P.R. 1983).

However, some lower courts saw no constitutional defect in permitting unions to use union- or agency-shop provisions as a means of obtaining forced loans to subsidize their political and ideological activities unrelated to collective bargaining. Cases holding that a post-spending refund is an adequate remedy included the decisions of the Michigan Court of Appeals in this action and in *Kempner v. Local 2077, State, County & Municipal Employees*, 126 Mich. App. 452, 459-61, 337 N.W.2d 354, 357-58 (1983),[2] and, most significantly, *Ellis v. Railway Clerks*, 685 F.2d 1065, 1069-70 (9th Cir. 1982), *rev'd in pertinent part*, No. 82-1150 (U.S. Apr. 25, 1984).

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[2] In *Kempner* the Michigan Court of Appeals went even further than in this case. *Kempner* held that dissenting nonmembers must pay all disputed fees to the union while exhausting a mandatory intra-union rebate scheme before seeking administrative or judicial relief. 126 Mich. App. 461-63, 337 N.W.2d at 358-59.

In short, *Abood* and these conflicting lower-court decisions show that this case presents a substantial federal constitutional question which this Court had not resolved prior to *Ellis*. In the Michigan courts Mr. Jibson argued, citing the traditional First-Amendment principles applied in *Abood*, 431 U.S. at 233-36, that the only valid agency-shop arrangement is one which prevents even *temporary* use of coerced monies for impermissible purposes. *Ellis* establishes unequivocally that Mr. Jibson was correct.

In discussing the issue of the validity of a rebate scheme, *Ellis* first states that the opinions in *Abood* and *Allen* "did not, nor did they purport to, pass upon the statutory *or constitutional* adequacy of the suggested remedies. Doing so now, we hold that the pure rebate approach is inadequate." *Ellis*, slip op. at 6-7 (emphasis added) (footnote omitted). The Court then explains its reasoning for this holding:

> By exacting and using full dues, then refunding months later the portion that it was not allowed to exact in the first place, the union effectively charges the employees for activities that are outside the scope of the statutory authorization. The cost to the employee is, of course, much less than if the money was never returned, but this is a difference of degree only. The harm would be reduced were the union to pay interest on the amount refunded, but respondents did not do so. Even then the union obtains an involuntary loan for purposes to which the employee objects.
>
> The only justification for this union borrowing would be administrative convenience. But there are readily available alternatives, such as advance reduction of dues and/or interest-bearing escrow

> accounts, that place only the slightest additional burden, if any, on the union. *Given the existence of acceptable alternatives, the union cannot be allowed to commit dissenters' funds to improper uses even temporarily. A rebate scheme reduces but does not eliminate the statutory violation.*

Id. at 7 (emphasis added).

This case cannot be distinguished from *Ellis*. A court-determined post-spending refund is no less a forced loan than one administered by a union. The escrow remedy requested by Mr. Jibson is one of the acceptable alternatives specifically recognized by the Court in *Ellis*. This case differs from *Ellis* only in the sense that the rights being violated here are wholly constitutional in nature, not statutory, because the Michigan agency-shop statute itself "'sanctions the use of nonunion members' fees for purposes other than collective bargaining.'" *Abood*, 431 U.S. at 232, *quoting Abood v. Detroit Board of Education*, 60 Mich. App. 92, 99, 230 N.W.2d 322, 326 (1975). As the Court said in *Abood*, 431 U.S. at 240, "that difference surely could not justify any lesser relief in this case."

The Michigan Court of Appeals pretended to "continue to adhere to th[e] principle" that "accords paramount status to the employee's First Amendment rights vis-a-vis the union's right to that portion of the fee which will be used for collective bargaining, contract administration and grievance adjustment." App. A, *infra*, p. 7a. However, by requiring Mr. Jibson to pay the entire fee to the Union as a prerequisite to adjudication of its amount, the court in fact accorded greater importance to the Union's statutory interest in obtaining the (unknown) portion of the fee to which it might be entitled. *Id.*, pp. 7a-8a.

The court of appeals asserted a belief that "the employee's First Amendment rights can be adequately safeguarded if the disputed fee is paid to the union and the employee immediately files suit for a declaratory judgment" and moves for an expedited hearing under Michigan General Court Rule 521. *Id.* This assumption completely ignores the realities of litigation in this type of case: the time-consuming discovery, procedural delays, and difficult accounting problems which were predicted as early as *Street*, 367 U.S. at 780 (Whittaker, J., dissenting), 795-96 (Black, J., dissenting).

The primary issues in litigation in which a dissenting employee has raised a First-Amendment objection to the amount of an agency-shop fee are identification of the nature and amount of each of the union's expenditures; determination of which union activities are related to collective bargaining, contract administration and grievance adjustment; and calculation of the amount of a constitutionally permissible fee. These are complex and "difficult" factual issues which this Court twice has ruled should not be determined in the absence of a concrete and comprehensive evidentiary record. *Abood*, 431 U.S. at 236-37; *Allen*, 373 U.S. at 120-21. They are also issues which require an "adversary presentation." *Abood*, 431 U.S. at 236.

Factual concreteness and a fair adversary proceeding cannot reasonably occur unless the employee is allowed discovery of the union's financial records. *Lehnert v. Ferris Faculty Association*, 556 F. Supp. 316 (W.D. Mich. 1983); *see Hickman v. Taylor*, 329 U.S. 495, 507 (1947). The burden of proving what proportion of fees is spent for permissible purposes is on the union. *Ellis*, slip op. at 20 n.15, *citing Allen*, 373 U.S. at 122. But the employee cannot attempt to rebut the union's evidence and cross-examine, and perhaps even impeach, its witnesses unless he previously

has had access to the potential evidence. *See Robinson*, 547 F. Supp. at 1313, 1318-19.

In this case, the potential evidence, the books and records of the Union and its state and national affiliates,[3] is in the possession and control of the Union, not Mr. Jibson, as the court of appeals recognized. App. A, *infra*, p. 8a. Common sense and the reported history of other agency-shop cases leave no doubt that discovery and trial of the facts concerning the activities and expenditures of the Union and its affiliates is a major undertaking requiring many months, at least, to complete. *See, e.g.*, *Ellis*, 685 F.2d at 1067-68, 1071, *aff'g in part* 88 Lab. Cas. ¶ 11,986 (S.D. Cal. 1980) (filed 1973, interlocutory summary judgment entered 1976, tried 1978, final trial court decision 1980; "extensive discovery for five years"; at trial union produced "voluminous financial records" and detailed testimony of numerous witnesses); *Beck v. Communications Workers*, 106 L.R.R.M. 2323, 2324 (1981) (27-day hearing before Special Master), *further proceedings*, 112 L.R.R.M. 3069, 3072 (D. Md. 1983) (over 800 additional pages of transcript and more than 3000 exhibits on re-reference); *see also Robinson*, 547 F. Supp. at 1305, 1312 n.5, 1313-14, 1318-19, 565 F. Supp. at 946 (discussing the obvious time-consuming nature of the inquiry).

Thus, the court of appeals' decision gives Mr. Jibson two options after paying the disputed service fees to avoid being fired, *neither* of which adequately protects his First-Amendment right not to subsidize the Union's political and ideological activities unrelated to collective bargaining. On the one hand, if Mr. Jibson moves for an early hearing in a declaratory judgment action, he will have to do without the discovery which is essential to a truly adversary proceeding

[3] The Union is a local affilate of the Michigan Education Association and the National Education Association. Complaint at 1-2 (filed Jan. 9, 1979).

and reasonably accurate adjudication of a constitutionally valid fee.[4] In that case, an inaccurate determination is likely, and the Union can indefinitely collect a fee which includes monies that will be used for impermissible purposes. On the other hand, if Mr. Jibson forgoes an expedited hearing in order to obtain discovery and a fair trial, the Union will have the unfettered use of his fees over a long period of time, subjecting him to the certainty that in the interim his funds will be spent on political and ideological activities unrelated to collective bargaining.

Neither result is permitted by the Constitution. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion). The irreparable injury in agency-shop cases in clear:

> [T]he stark reality is that the subsequent rebate of compulsory funds misspent on activities having significant first amendment sensitivity cannot undo the infringement of constitutional rights that the expenditure caused in the first instance. Once political or ideological viewpoints have been expressed or political influence applied, they cannot be withdrawn "from the marketplace of ideas, the legislative chamber, or the polling booth."

Levinson, *After Abood: Public Sector Union Security and the Protection of Individual Public Employee Rights*, 27 Am. U. L. Rev. 1, 28-29 (1977) (footnote omitted); *see Ellis*, slip op. at 7; *Cort v. Ash*, 422 U.S. 66, 84 (1975).

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[4] This is true not only as a practical matter, but as a matter of law: "if [a declaratory judgment] case is noticed on for early hearing as a motion, discovery and pretrial will be waived." I H. Gilmore, *Michigan Civil Procedure Before Trial* § 12.611(A), at 491 (2d ed. 1982 Supp.).

The decisions of this Court "have prohibited conditions on public benefits, in the form of jobs or otherwise, which dampen the exercise generally of First Amendment rights, however slight the inducement to the individual to forsake those rights." *Elrod*, 427 U.S. at 358 n.11; *see Abood*, 431 U.S. at 234 n.31. Because it allows unions to spend coerced fees, no matter how small the amount, before the constitutionality of the spending has been adjudicated, the procedural scheme of the Michigan agency-shop statute, as applied by the court of appeals, works an incurable prior restraint upon dissenters' freedom not to speak for or associate with political and ideological causes they oppose.

As the Court held in *Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940),

> The availability of a judicial remedy for abuses in the system * * * still leaves that system one of previous restraint which, in the field of free speech * * *, we have held inadmissible. A statute authorizing previous restraint upon the exercise of the guaranteed freedom by judicial decision after trial is as obnoxious to the Constitution as one providing for like restraint by administrative action.

The inherent vice of any agency-shop scheme which relegates employees to a post-spending remedy is its cession to unions of the power irreparably to compromise fundamental employee freedoms in advance — and thus in a manner subversive — of meaningful judicial review.

The reasons for insisting upon strict procedural standards are particularly compelling in cases involving political speech and association. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 162-63 (1969) (Harlan, J., concurring); *Carroll v. President of Princess Anne*, 393 U.S. 175,

182 (1968). *Ellis* holds that there are alternative agency-shop procedural systems, such as interim escrow, which are less restrictive of fundamental First-Amendment rights than that adopted by Michigan in PERA § 10(1)(c) and (2). The statute therefore is unconstitutional as applied.

CONCLUSION

For the foregoing reasons, the Court should summarily reverse the decision below and declare the Michigan agency-shop statute unconstitutional as applied. Further, the Court should remand the case with directions to permit Mr. Jibson to deposit his service fees in an interest-bearing escrow account pending a determination by the Newaygo County Circuit Court of the amount that he may constitutionally be charged. In the alternative, the Court should note probable jurisdiction of the appeal and set it down for plenary briefing and argument.

Respectfully submitted,

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May 7, 1984

APPENDICES

APPENDIX A

Opinion and Judgment
of the
Michigan Court of Appeals

STATE OF MICHIGAN
COURT OF APPEALS

WHITE CLOUD EDUCATION ASSOCIATION,
Plaintiff-Appellee,

-v-

BOARD OF EDUCATION OF THE WHITE CLOUD PUBLIC SCHOOLS,
Defendant-Appellant,

NOV 4, 1980
Nos. 45898; 46178

and

WILLIAM JIBSON,
Intervenor Defendant-Appellant.
/

[as officially reported in 101 Mich. App. 309]

Before: BASHARA, P.J., and M.J. KELLY and D.R. FREEMAN,* JJ.

D.R. FREEMAN, J. Defendants appeal as of right from the trial court's order granting summary judgment to plaintiff on June 19, 1979, which provided that defendant Board

*Circuit judge, sitting on the Court of Appeals by assignment.

of Education discharge intervenor-defendant Jibson for failure to pay the mandatory agency shop fee provided for in the collective bargaining agreement between the parties.

Defendant Board and plaintiff entered into a collective bargaining agreement for the 1977-1978 and 1978-1979 school years, requiring teachers to become members of the union or pay an agency shop fee equivalent to union dues as a condition of continued employment. When intervenor-defendant Jibson, a tenured teacher, refused to become a member of the union or pay the agency shop fee, the union asked the Board to hold a tenure hearing and discharge him. Based upon the Michigan teachers' tenure act ("TTA"), 1967 PA 216 as amended, MCL 38.71 *et seq.*; MSA 15.1971 *et seq.*, the Board refused to honor the union's request. The union brought this suit demanding that intervenor-defendant Jibson be discharged for failure to pay the agency shop fee.

The critical issue in this case involves a conflict between the TTA, and the public employment relations act ("PERA"), 1947 PA 336, as amended, MCL 423.201 *et seq.*; MSA 17.455(1) *et seq.* MCL 38.101; MSA 15.2001 provides that discharge of a tenured teacher "may be made only for reasonable and just cause, and only after such charges, notice, hearing, and determination thereof, as are hereinafter provided". Jibson argues that nonpayment of an agency shop fee is not "reasonable and just cause" for discharge of a tenured teacher, and that he is thus protected from discharge for failing to pay the fee.

In conflict with Jibson's argument is section 10 of PERA, which provides as follows:

"Provided further, [t]hat nothing in this act or in any law of this state shall preclude a public employer from making an agreement with an exclusive bargaining representative as defined in section [eleven] [footnote omitted] to require as a condition of employment that all employees in the bargaining unit pay to the exclusive

bargaining representative a service fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative." MCL 423.210(1)(c); MSA 17.455(10)(1)(c).

Section 10 further provides that:

"It is the purpose of this amendatory act to reaffirm the continuing public policy of this state that the stability and effectiveness of labor relations in the public sector require, if such requirement is negotiated with the public employer, that all employees in the bargaining unit shall share fairly in the financial support of their exclusive bargaining representative by paying to the exclusive bargaining representative a service fee which may be equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative." MCL 423.210(2); MSA 17.455(10)(2).

This section was amended by 1973 PA 25, following the Michigan Supreme Court's decision in *Smigel v Southgate Community School Dist*, 388 Mich 531, 543; 202 NW2d 305 (1972), that an agency shop provision requiring as a condition of employment that all employees either join the union and pay dues or pay the equivalent agency shop fee was repugnant on its face to the provisions of PERA. The United States Supreme Court has since upheld the validity of union shop clauses in the public employment sector. *Abood v Detroit Board of Education*, 431 US 209; 97 S Ct 1782; 52 L Ed 2d 261 (1977).

In *Rockwell v Crestwood School Dist Board of Education*, 393 Mich 616, 629-630; 227 NW2d 736 (1975), the Michigan Supreme Court stated as follows with regard to conflicts between PERA and the TTA:

"This Court has consistently construed the PERA as the dominant law regulating public employee labor relations. In *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44; 214 NW2d 803 (1974), we held that residency and retirement benefits are mandatory

subjects of collective bargaining under the PERA, although provisions of a city's ordinance and charter, promulgated under the home rule act, would otherwise govern. Earlier, in *Regents of the University of Michigan v Employment Relations Comm*, 389 Mich 96; 204 NW2d 218 (1973), this Court 'harmonized' the constitutional authority of the Regents to supervise the university and the authority of the Legislature to provide for the resolution of public employee disputes, holding that interns and residents in the University of Michigan Hospital were entitled to engage in collective bargaining. In *Wayne County Civil Service Comm v Board of Supervisors*, 384 Mich 363, 374; 184 NW2d 201 (1971), this Court held that the original authority and duty of the Wayne County Civil Service Commission 'was diminished *pro tanto*' by the PERA 'to the extent of free administration of the latter'.

"The analysis is the same whether we label this reconciliation repeal by expression or by implication, *pro tanto* diminishing or harmonizing. The supremacy of the provisions of the PERA is predicated on the Constitution (Const 1963, art 4, sec 48) and the apparent legislative intent that the PERA be the governing law for public employee labor relations.

"The teachers' tenure act was not intended, either in contemplation or design, to cover labor disputes between school boards and their employees. The 1937 Legislature in enacting the teachers' tenure act could not have anticipated collective bargaining or meant to provide for the resolution of labor relations disputes in public employment. This Court's observation in *Wayne County Civil Service Comm, supra*, is pertinent: 'In [no] instance could collective bargaining by public employees have been in the minds of the people, or of the [1937] legislators. The thought of strikes by public employees was unheard of. The right of collective bargaining, applicable at the time to private employment, was then in comparative infancy and portended no suggestion that it eventually might enter the realm of *public* employment.' (Emphasis by the Court.)" (Footnotes omitted.)

In a more recent decision, this Court concluded that the PERA provision authorizing agency shop fees superseded

both the substantive and procedural protections embodied in the TTA. *Detroit Board of Education v Parks*, 98 Mich App 22; 296 NW2d 815 (1980). The *Parks* Court found that a collective bargaining agreement providing for discharge of a nonpaying employee was valid and enforceable, despite the TTA requirement of reasonable and just cause to terminate. The Court also held:

"Unlike section 6 of the PERA, which specifically superseded not only the substantive but also the procedural requirements of the Tenure Act with regard to teachers who are dismissed for striking, section 10 allows an agency shop agreement as a condition of employment but does not provide procedures for dismissal. In light of the legislative intent that the PERA occupy the field of labor relations in the public sector, however, it would be inappropriate to follow the procedures set forth in the Tenure Act." (Footnote omitted.)

Although the *Parks* Court rejected as inapplicable the hearing requirements of the TTA, it still found a pretermination hearing necessary to satisfy procedural due process. The sole issue at such a hearing is to be whether the recalcitrant employee paid the agency shop fee. The Court found that the Board failed to provide Parks with a hearing prior to termination. However, in a factual setting similar to the instant case, the *Parks* Court found the Board's failure to hold a hearing did not constitute reversible error:

"The agency shop clause itself does now and always has required notice of nonpayment of the fees and Parks received such notice, including notice of the possibility of discharge as a result. It would be pointless, however, to require that the Board now hold a hearing for Parks. She has already appealed her discharge to the Tenure Commission and we review its decision now. Furthermore, she has submitted an affidavit stating that she has not paid agency shop fees since 1973-74 and that she paid the

fees that year 'under protest'. There is, therefore, no factual dispute to be resolved at a hearing and we hold that it is not necessary to hold one."

We find that the provisions of the TTA are not applicable to the instant dispute. We also find that employee Jibson's admitted refusal to pay requisite agency shop fees precludes the need to hold a hearing to determine the fact of payment. Therefore, the lower court did not err in ordering summary judgment in the plaintiff's favor.

Jibson also contests that aspect of the lower court's decision refusing his request to have the disputed fees placed in escrow pending a determination of the amount applicable to collective bargaining and contract administration. *Abood v Detroit Board of Education, supra.* In pertinent part, the circuit court's order provides:

"I[t is further ordered and adjudged], that if the Intervenor pays to the Plaintiff the amount of $231.20, which is sought by the Plaintiff as the appropriate amount of the agency shop fee, then this Court will, upon request by the Intervenor, determine the appropriate amount of the agency shop fee pursuant to *Abood v Detroit Board of Education*, 431 US 209 (1977), and Intervenor's request that such funds be placed in an escrow account pending such determination is denied."

Pursuant to the *Abood* decision, public employees may not be compelled to pay agency shop fees which will be used to support ideological activities unrelated to collective bargaining. Thus, Jibson has the right to challenge that portion of the agency shop fee which is used to support ideological activities to which he objects. See also, *Ball v Detroit*, 84 Mich App 383; 269 NW2d 607 (1978).

After the circuit court granted plaintiff's motion for summary judgment, the Board filed a motion for a new trial and amendment of the judgment and Jibson moved to intervene as a defendant. The court granted Jibson's motion to

intervene and agreed to grant a new trial if Jibson first paid the contested fee to the union. The motion was denied when Jibson refused to pay the fee to the union, offering instead to pay it into an escrow account pending the circuit court's determination of the amount thereof not used for ideological activities Jibson did not choose to support.

In *Ball v Detroit*, 84 Mich App 383, 397; 269 NW2d 607 (1978), this Court stated as follows with regard to the use of escrow accounts in cases such as this:

"The Supreme Court concluded the Michigan Court of Appeals was correct in denying the, '*broad* injunctive relief requested.' *Abood, supra*, at 241 (emphasis supplied). However we agree with plaintiffs that allowing the union the use of funds prior to a judicial determination subjects nonmembers to the risk that their fees may be used, even temporarily, for activities to which they are opposed. Because fundamental First Amendment rights are at stake, we believe the proper solution is to require nonmembers to pay service fees into an escrow account. While we recognize this works somewhat of a hardship on the union because temporarily it will be unable to collect even the portion of service fees to which it is entitled, that hardship is outweighed by the possibility that First Amendment rights will be violated. Establishing a temporary escrow account is not the broad injunctive relief prohibited in *Abood*. Rather it is a temporary measure designed to ensure nonmembers pay their service fees or face dismissal and to ensure the union will have prompt access to the funds to which it is entitled after a judicial determination. Whatever remains in the escrow account shall be refunded to the objecting nonmembers."

Our ruling in *Ball* clearly accords paramount status to the employee's First Amendment rights vis-a-vis the union's right to that portion of the fee which will be used for collective bargaining, contract administration and grievance adjustment. While we continue to adhere to that principle, we now believe that the employee's First Amendment rights can be adequately safeguarded if the disputed fee is paid to

the union and the employee immediately files suit for declaratory judgment under GCR 1963, 521. That court rule provides for judicial declaration of "the rights and other legal relations of • • • interested part[ies]" and authorizes the circuit court to "order a speedy hearing of an action for declaratory relief" and to "advance [such hearing] on the calendar". In this manner, while the employee can quickly move for a resolution of the issue and a vindication of his constitutional rights, the union is not crippled by nonaccess to that portion of the fee which will be used for collective bargaining, contract administration and grievance adjustment. In the context of such an action for declaratory judgment the union shall have the burden of establishing the proportion of the agency shop fee which is dedicated to uses to which the employee does not object. *Railway Clerks v Allen*, 373 US 113, 122; 83 S Ct 1158, 1163; 10 L Ed 2d 235, 241 (1963). The union possesses the facts and records from which such proportion can be determined and it is only fair that the burden be imposed on the party who has access to that information.

The circuit court decision granting summary judgment to the plaintiff and directing defendant Board of Education to discharge Jibson for failure to pay agency shop fees is affirmed. Should Jibson decide to pay the fees prior to the entrance of a formal discharge order by the Board, he may initiate an action for declaratory judgment for the purpose noted in this opinion.

Affirmed.

BASHARA, P.J., concurred.

M.J. KELLY, J. *(concurring).* I concur in the majority's opinion, but write separately in an attempt to clarify the procedures to be followed when a teacher subject to an agency shop fee agreement refuses to pay the stipulated fee.

The majority's reference to the remedy of dismissal for nonpayment, established in *Detroit Board of Education v Parks*, 98 Mich App 22; 296 NW2d 815 (1980), addresses only the situation of a refusal to pay under a collective bargaining agreement requiring payment as a condition of employment. MCL 423.210(1); MSA 17.455(10)(1). However, in the absence of a contract provision making the fee a condition of employment (or where the union does not want to initiate a dismissal hearing) a second remedy is available, although not exactly ravishing.

The union could pursue recovery in a civil action brought against the nonpaying teacher. It has been held that "[w]hen a statute provides a beneficial right but no civil remedy for its securance, the common law on its own hook provides a remedy". See *B F Farnell Co v Monahan*, 377 Mich 552, 555; 141 NW2d 58 (1966). See also *Cort v Ash*, 422 US 66; 95 S Ct 2080; 45 L Ed 2d 26 (1975), and the cases cited therein for a discussion of the four factors to be considered in determining whether a private remedy may apply to a statute not expressly providing one. The Legislature has manifested a clear intent to eliminate "free riders" from receiving benefits acquired in collective bargaining, without bearing the costs of union support. MCL 423.210; MSA 17.455(10). The consequent requirement that a nonunion employee be liable in a civil action for payment of the agency shop fee merely recognizes the unions' right of recovery in *quantum meruit* for services provided. See *Detroit Board of Education v Parks, supra*, fn 15. See also, *Central Michigan University v U[x]*(Docket No. 77-1040, released August 1, 1977 [unreported]), a decision on petitioner's application for leave to appeal, recognizing the option of a civil suit for recovery. Thus, a union has a choice of remedies against a nonmember refusing to pay the agency shop fee. The union could notify the board of education that a nonmember has

refused payment, thus requiring the board to initiate a dismissal hearing. The union could also institute a suit to recover the fees directly from the teacher refusing payment. Should a collective bargaining agreement require payment of agency shop fees without making the obligation a condition of employment, the union may still pursue its private remedy to recover the fee.

APPENDIX B

Opinions and Orders
of the
Circuit Court for the County of Newaygo

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF NEWAYGO

WHITE CLOUD EDUCATION ASSOCIATION,
Plaintiff

-vs-

File No.
79-4506 CL

BOARD OF EDUCATION OF THE WHITE CLOUD PUBLIC SCHOOLS,

OPINION

Defendant
_____/

[Apr. 25, 1979]

Both parties in this action have filed Motions for Summary Judgment, claiming that there are no genuine issues of material fact. Plaintiff's Motion for Summary Judgment additionally claims that Defendant's Answer fails to state a valid defense to the claim asserted against it. An examination of the record in this cause reveals that the parties are correct in that there are no genuine issues of material fact and the Defendant's Answer does fail to state a valid defense to the claim asserted against it.

Plaintiff and Defendant entered into a collective bargaining agreement effective September 1, 1977, through August 31, 1979. The agreement required as a condition of

employment that a teacher member of the collective bargaining unit either become a member of Plaintiff Association or pay a service fee to the Plaintiff of an amount equivalent to the dues uniformily required to be paid by members of Plaintiff Association. The agreement further required that in the event that the teacher shall not pay such service fee, the Defendant shall terminate the employment of such teacher.

William Jibson, a tenured teacher employed by Defendant and a member of the bargaining unit represented by Plaintiff failed to join the Plaintiff Association or to pay the service fee required by the collective bargaining agreement.

Plaintiff, consistent with the procedure outlined in the agreement requested defendant to discharge said William Jibson for failure to pay the service fee. Defendant refused citing a decision of the Michigan State Teachers' Tenure Commission in a matter entitled *Kathryn Jackson* -v- *Swartz Creek Community Schools*, wherein said Commission ruled that failure to pay an agency shop fee, even though contractually required as a qualification or condition of employment, does not constitute just and reasonable cause for discharge of a tenured teacher under the Michigan Teachers' Tenure Act.

Plaintiff claims that Section 10.1(c) of the Public Employment Relations Act (MCLA 423.210(1) (c); MSA 17.455 (10) (1) (c) authorizing the agency shop provisions of the labor contract are controlling and dominant in regulating public employee labor relations and that this case is purely one of regulating labor relations.

Defendant agrees with the Plaintiff with the exception that tenured teachers come under the provisions of the Michigan Teachers' Tenure Act and the decision of the State Tenure Commission in *Kathryn Jackson* -v- *Swartz Creek Community Schools*. Defendant also contends that for the Court to hold otherwise, it would have to determine that the

1973 amendment to the Public Employment Relations Act concerning agency shop, by implication, amended the Michigan Teachers' Tenure Act. Defendant further contends that Section 10(1)(c) of the Public Employment Relations Act is unconstitutional under Const 1963, Art 4, Sec. 24 as embracing an object not expressed in the title of the act.

This Court holds that the present controversy is a matter of public employment labor relations and therefore the Public Employment Relations Act is dominant and controlling (*Rockwell* -v- *Crestwood School District*, 393 Mich 616 (1975). The Public Employment Relations Act expressly authorizes Plaintiff and Defendant to enter into a labor agreement and to include in that agreement an agency shop provision.

This Court sees no inconsistency between the Public Employment Relations Act and the Teachers' Tenure Act as they apply to the facts of the case at bar. The inconsistency advocated by the Defendant is between the Public Employment Relations Act and a decision of the State Teachers' Tenure Commission as reported in *Kathryn Jackson* -v- *Swartz Creek Community Schools.*

The Court of Appeals of this State in the case of *Chester* -v- *Harper Woods School District*, 87 Mich App 235 (1978) made it clear that it is the local school board which determines the criteria of teacher qualification because it is the local board, not the State Tenure Commission, who is charged with the duty of hiring duly qualified teachers. Further, in that case at page 246 the Court said:

> "...Thus in reviewing the determination of a school board that a tenured teacher is not qualified for an available position, the tenure commission is constrained to apply the criteria of qualifications set out by the school board unless that criteria itself is either arbitrary, unreasonable or promulgated in bad faith. To further expand the jurisdiction of the commission

would be to render it the legislator of all teacher qualification at the expense of local control. If the Legislature intended to deprive local governing bodies of legislative control over teachers' qualification, that intent should have been definitely stated in the tenure act..."

This court recognizes that in *Chester* -v- *Harper Woods School District* (supra) the Court of Appeals was concerned with the academic qualifications of teachers to fill vacancies as opposed to other than academic qualifications set forth in collective bargaining agreements. However, this Court is of the opinion that the reasoning of the Court of Appeals in that case is applicable to the case at bar and the Tenure Commission,"... is not free to substitute its idea of qualification for that of the board. Where the local board's definition is neither arbitrary, unreasonable nor promulgated in bad faith, it is binding upon the tenure commission." (*Chester* -v- *Harper Woods School District*, 87 Mich App 235,247 (1978))

In the present case, Plaintiff and Defendant, pursuant to the law of this State, negotiated a labor contract in good faith. In agreeing to the agency shop provision of that contract, expressly authorized, the Defendant local school board cannot be said to have created a qualification for tenured teacher employment that is either arbitrary, unreasonable or promulgated in bad faith. To the contrary, it can only be said that the Defendant acted consistent with the Public Employment Relations Act of this State.

Further, the Defendant did not act inconsistent with the State Teachers' Tenure Act as that Act does not pretend to control labor relations nor does it give the State Tenure Commission the authority to set teacher qualifications.

Therefore, this Court views the State Tenure Commission's decision in the matter of *Kathryn Jackson* -v- *Swartz Creek Community Schools* as being clearly beyond the

scope of the Tenure Commission's authority and not a basis for Defendant's refusal to discharge its obligations under the collective bargaining agreement now in effect between the Plaintiff and the Defendant.

This Court also rejects the argument of the Defendant that Section 10(1) (c) of the Public Employment Relations Act is unconstitutional under Const 1963, Art. 4, Sec. 24 as embracing an object not expressed in the title of the act as that constitutional provision was designed mainly to prevent the Legislature from passing laws not fully understood and there is no basis to suggest that the Legislature did not know what it was doing in passing Section 10(1) (c) of the Public Employment Relations Act.

Therefore, Plaintiff's Motion for Summary Judgment is granted and Defendant's Motion for Summary Judgment is denied.

April 25, 1979.

/s/
Terrence R. Thomas, Circuit Judge

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF NEWAYGO

WHITE CLOUD EDUCATION ASSOCIATION,
Plaintiff,

vs.

File No. 79-4506-CL

BOARD OF EDUCATION OF THE WHITE CLOUD PUBLIC SCHOOLS,
Defendant.
/

[identification of attorneys omitted]

SUMMARY JUDGMENT

At a session of said Court held in the Circuit Courtroom, County of Newaygo, State of Michigan, on this 25[th] day of April, 1979.

PRESENT: HONORABLE TERRENCE R. THOMAS,
Circuit Judge

Plaintiff's and Defendant's Motions for Summary Judgment having come on to be heard, and the parties having been heard thereon by briefs and oral arguments; and the Court being fully advised in the premises; now, therefore,

IT IS ORDERED AND ADJUDGED, that the agency shop provisions in the current collective bargaining agreement between Plaintiff and Defendant are valid and of full force and effect according to their terms; and

IT IS FURTHER ORDERED AND ADJUDGED, that said agency shop provisions do not contravene the Constitution of the State of Michigan or the statutes of the State of Michigan, including the Public Employment Relations Act,

the Michigan Teacher Tenure Act, the Michigan Penal Code, or the Michigan school laws; and

IT IS FURTHER ORDERED AND ADJUDGED, that the Michigan Teacher Tenure Act is inapplicable procedurally and substantively to, and does not prohibit, the termination of teachers for non-compliance with the provisions of an agency shop agreement pursuant to 1973 PA 25, MCLA 423.210; MSA 17.455(10), in that, pursuant to said 1973 PA 25, MCLA 423.210; MSA 17.455 (10), which controls over any other law to the contrary, *nothing* in this act [PERA] or any law of this state," including the Michigan Teacher Tenure Act, precludes such agency shop agreements or their enforcement as a condition of employment.

IT IS FURTHER ORDERED AND ADJUDGED, that Defendant Board of Education shall promptly hold a "due process hearing" in connection with the charges filed by Plaintiff concerning the employment of William Jibson, said hearing to be limited to a determination of whether Mr. Jibson has failed to pay the agency shop service fee required by contract; and

IT IS FURTHER ORDERED, that upon a finding that Mr. Jibson has failed to pay the required agency shop service fees, the Defendant shall discharge Mr. Jibson from employment; and

IT IS FURTHER ORDERED, that the Court retain jurisdiction over this matter pending the aforesaid "due process hearing";

The Court expressly determines, pursuant to GCR 518.2, that a final summary judgment should be entered, as herein provided, there being no just reason for delay, and judgment is hereby accordingly so directed.

/s/

Terrence R. Thomas
Newaygo Circuit Judge

[clerk's certificate omitted]

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF NEWAYGO

WHITE CLOUD EDUCATION ASSOCIATION,
Plaintiff,

-vs-

BOARD OF EDUCATION OF THE WHITE CLOUD PUBLIC SCHOOLS,
Defendant, and

File No. 79-4506-CL

WILLIAM JIBSON,
Proposed intervenor,

[identification of attorneys omitted]

ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL AND AMENDMENT OF JUDGMENT, GRANTING INTERVENOR'S MOTION TO INTERVENE, AND SUPPLEMENTING PREVIOUS SUMMARY JUDGMENT

At a session of said Court held in the Circuit Courtroom, County of Newaygo, State of Michigan, on this 19th day of June, 1979.

PRESENT: HONORABLE TERRENCE R. THOMAS, CIRCUIT JUDGE.

Defendant's Motion for New Trial and Amendment of Judgment, and Proposed Intervenor's Motion to Intervene, having come on to be heard, and the parties and Proposed Intervenor having been heard thereon either by briefs or by oral argument; and the Court being fully advised in the premises;

NOW THEREFORE, IT IS ORDERED AND ADJUDGED, that Bruce N. Cameron be admitted to appear of counsel in the entitled cause on behalf of Intervenor.

IT IS FURTHER ORDERED AND ADJUDGED, that Defendant's Motion for a New Trial and Amendment of Judgment is denied and the Court's April 25, 1979 Summary Judgment is reaffirmed in its entirety except that the Defendant Board need not hold a "due process hearing" for the sole purpose of determining whether Mr. Jibson has failed to pay the agency shop service fee required by the contract because Mr. Jibson has admitted in his pleadings in this Court file that said agency shop service fee has not been paid;

IT IS FURTHER ORDERED AND ADJUDGED, that Defendant shall discharge Mr. Jibson from employment for failure to pay the agency shop fee, said discharge to be stayed during the pendency of any appellate proceedings in the within cause;

IT IS FURTHER ORDERED AND ADJUDGED, that if the Intervenor pays to the Plaintiff the amount of $231.20, which is sought by the Plaintiff as the appropriate amount of the agency shop fee, then this Court will, upon request by the Intervenor, determine the appropriate amount of the agency shop fee pursuant to Abood v Detroit Board of Education 431 U.S. 209 (1977), and Intervenor's request that such funds be placed in an escrow account pending such determination is denied.

The Court expressly determines, pursuant to GCR 518.2, that a final Summary Judgment should be entered, as herein provided, there being no just reason for delay, and judgment is hereby accordingly so directed.

/s/

Terrence R. Thomas
Newaygo County Circuit Judge

[clerk's certificate omitted]

APPENDIX C

Order of the Michigan Court of Appeals
Denying Intervenor's Application for Rehearing

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Detroit, on the third day of February in the year of our Lord one thousand nine hundred and eighty-one. [Order entered Feb. 11, 1981.]

Present the Honorable
GEORGE N. BASHARA, JR.
Presiding Judge
MICHAEL J. KELLY
DONALD R. FREEMAN
Judges

WHITE CLOUD EDUCATION ASSOCIATION,
Plaintiff-Appellee,

-v-

BOARD OF EDUCATION OF THE WHITE CLOUD PUBLIC SCHOOLS,
Defendant,

Docket No. 46178
L. C. No. 79-4506-CL

and

WILLIAM JIBSON,
Intervenor Defendant-Appellant.

In this cause, an application for rehearing is filed by intervenor defendant-appellant, and an answer in opposition

thereto having been filed by plaintiff-appellee, and due consideration thereof having been had by the Court,

IT IS ORDERED that the application for rehearing be, and the same is hereby DENIED.

[clerk's certificate omitted]

APPENDIX D

Order of the Michigan Supreme Court Denying Intervenor's Application for Leave to Appeal

---

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 7th day of February in the year of our Lord one thousand nine hundred and eighty-four.

Present the Honorable
G. MENNEN WILLIAMS,
Chief Justice

THOMAS GILES KAVANAGH,
CHARLES L. LEVIN,
JAMES L. RYAN,
JAMES H. BRICKLEY,
MICHAEL F. CAVANAGH,
PATRICIA J. BOYLE,
Associate Justices.

CR 33-71

WHITE CLOUD EDUCATION ASSOCIATION,
Plaintiff-Appellee,

v

BOARD OF EDUCATION OF THE WHITE CLOUD PUBLIC SCHOOLS,
Defendant,

and

WILLIAM JIBSON,
Intervenor Defendant-Appellant.

SC: 66754
COA: 45898, 46178
LC: 79-4506 CL

On order of the Court, appellant's application for leave to

appeal having been ordered held in abeyance pending decision in *Detroit Board of Education* v *Parks* (Docket No. 65818), and said decision having been issued on June 27, 1983, 417 Mich 268,

Now, therefore, the said application is hereby considered, and it is DENIED, because the Court is not persuaded that the questions presented should be reviewed by this Court.

Williams, C.J., not participating.

[clerk's certificate omitted]

APPENDIX E

Notice of Appeal

STATE OF MICHIGAN
IN THE COURT OF APPEALS

WHITE CLOUD EDUCATION ASSOCIATION,
Plaintiff-Appellee,

-vs-

BOARD OF EDUCATION OF THE WHITE CLOUD PUBLIC SCHOOLS,
Defendant-Appellant,

and

WILLIAM JIBSON,
Intervenor-Defendant-Appellant.

Michigan Supreme Court
No. 66754

Court of Appeals
Docket No. 46178

Newaygo County Circuit
Court No. 79-4506-CL

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that William Jibson, the intervenor defendant-appellant above named, hereby appeals to the Supreme Court of the United States from that part of the final judgment of November 4, 1980, which affirms the summary judgment of the Circuit Court for the County of Newaygo dated June 19, 1979, and which holds that Section 10(1)(c) and (2) of the Michigan Public Employment Relations Act, MCLA 423.210(1)(c), (2); MSA 17.455(10)(1)(c), (2), as applied to require payment of contested service fees to

an exclusive bargaining representative, thereby permitting union expenditure of those fees for purposes other than collective bargaining, prior to an initial judicial determination of the amount of a constitutionally valid fee, is not repugnant to the first amendment to the Constitution of the United States. This court denied rehearing by order entered February 11, 1981, and the Supreme Court of Michigan denied intervenor's application for leave to appeal by order entered February 7, 1984.

This appeal is taken pursuant to 28 USC 1257(2).

Respectfully submitted,

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DATED: March 30, 1984

[A copy of the Notice of Appeal also was filed with the Circuit Court for the County of Newaygo, the court possessed of the record.]

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No. 83-1816

In The
Supreme Court of the United States
October Term, 1983

WILLIAM JIBSON,

Appellant,

vs.

WHITE CLOUD EDUCATION ASSOCIATION,

Appellee.

On Appeal From the Court of Appeals of Michigan

MOTION TO DISMISS

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TABLE OF CONTENTS

Pages

Table of Authorities i

Motion to Dismiss 1

Opinion Below 2

Jurisdiction 2

Constitutional and Statutory Provisions 2

Counter-Statement of the Case 2

Argument 4

Conclusion 12

Appendix A: Michigan Education Association Policy and Administrative Procedures Regarding Political-Ideological Expenditures 1a

TABLE OF AUTHORITIES

Cases:

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) 3, 5, 6, 11

Ellis v. Railway Clerks, 52 U.S.L.W. 4499 (U.S. Apr. 25, 1984) 5, 7, 9

Kempner v. Local 2077, State, County & Municipal Employees, 126 Mich. App. 452, 337 N.W.2d 354 (1983) 7, 9, 10, 11

Kempner v. Local 2077, State, County & Municipal Employees, 1982 Mich. Empl. Rel. Comm'n. Lab. Op. 287 (MERC Decision of March 11, 1982) 8, 9, 11

Kempner v. Local 2077, State, County & Municipal Employees, 1982 Mich. Empl. Rel. Comm'n. Lab. Op. 291 (ALJ Decision of February 24, 1981) 7, 8, 9, 10

TABLE OF AUTHORITIES—Continued

Pages

Statutes:

Michigan Public Employment Relations Act, Mich. Comp. Laws § 423.210(1)(c), (2) 2, 5

Michigan Teacher Tenure Act, Mich. Comp. Laws § 38.71, *et seq.* 3

No. 83-1816

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WILLIAM JIBSON,

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WHITE CLOUD EDUCATION ASSOCIATION,

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On Appeal From the Court of Appeals of Michigan

MOTION TO DISMISS

Plaintiff-Appellee White Cloud Education Association moves, pursuant to Rule 16 of the Rules of the Supreme Court, that the appeal herein be dismissed on the ground that the question on which the decision of the cause depends is so unsubstantial as not to require further argument.

OPINION BELOW

The challenged decisions of the Michigan Court of Appeals and of the Circuit Court for the County of Newaygo are set forth in the appendix of Appellant's Jurisdictional Statement.

—o—

JURISDICTION

The jurisdictional requisites are set forth in Appellant's Jurisdictional Statement.

—o—

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent constitutional and statutory provisions are set forth in Appellant's Jurisdictional Statement.

—o—

COUNTER-STATEMENT OF THE CASE

Appellant William Jibson was allowed to intervene in this case on June 19, 1979, some seven weeks after the Newaygo County Circuit Court had issued its April 25, 1979 Opinion and Order on the central issue that had been briefed and argued by the White Cloud Education Association and the White Cloud Board of Education. That issue, a matter of state law, was whether the discharge remedy in the agency shop provision of the collective bargaining agreement negotiated by those parties, and authorized by Michigan's Public Employment Relations Act, Mich. Comp. Laws § 423.210(1)(c), (2), was in conflict with the Michi-

gan Teacher Tenure Act, Mich. Comp. Laws § 38.71 *et seq.* Such conflict had been perceived by the Board of Education, whose consequent refusal to enforce the agency shop provision against Mr. Jibson caused the Association to file a declaratory judgment action against the Board.

After the circuit court's decision ruled the agency shop provision lawful, Mr. Jibson sought to intervene in order to assure that he would have standing to appeal the circuit court's decision to the Michigan Court of Appeals. The Board of Education cooperated with proposed intervenor Jibson by filing a motion for new trial, although the Board's counsel did not appear at the hearing thereon. The arguments in connection with the motion for new trial were heard in an informal conference in chambers and no record was made.

During that conference "the Court recognized the constitutional limitation upon an agency fee imposed by the United States Supreme Court in *Abood.*" Brief of Intervenor Defendant-Appellant William Jibson 30 (filed August 29, 1979, in the Michigan Court of Appeals). Although the union had adopted an agency fee objection procedure modeled after the one described in *Abood v. Detroit Board of Education,* 431 U.S. 209, 240 n. 41 (1977), Appellant not only declined to utilize that remedy but, most significantly, his offer to pay an agency fee into escrow was conditioned on the union disavowing its own objection procedure and instead commencing a lawsuit for the purpose of proving what portion of the contractual agency fee Mr. Jibson could be required to pay.

Because the circuit court's rejection of *this* limited escrow offer was in no way a ruling on the propriety of

escrow accounts generally, this case does not present a substantial federal question.

———o———

ARGUMENT

The Case Presents No Substantial Federal Question

Appellant's jurisdictional statement suggests that the question presented is whether the Michigan agency shop statute is unconstitutional if it is applied to allow a union, prior to *any* adjudication of the amount of a constitutionally permissible agency fee, to spend a dissenting employee's compulsory fee for political or ideological purposes unrelated to collective bargaining. However, the ruling of the Newaygo County Circuit Court, affirmed by the Michigan Court of Appeals, was far narrower than Appellant suggests. The Appellant never made an unconditional offer to pay the agency shop fee into an escrow account to avoid his discharge—rather, he only offered "to pay into an escrow account an amount equivalent to the dues uniformly required to be paid by members of the White Cloud Education Association (MEA, NEA & WCEA) as soon as the Association files a suit, in a court of competent jurisdiction, to prove the Intervenor's *pro rata* share of the Association's cost of collective bargaining, contract administration and grievance adjustment." Answer of Intervenor, ¶ (9) (filed May 24, 1979). Because of the limited nature of that offer, this case does not present the question whether, for example, an escrow approach is required where a dissenting employee utilizes a union-established procedure for determination of the

agency fee amount that an employee may constitutionally be required to pay. *See Abood,* 431 U.S. 209, 240 n. 41.

Appellant argues that the question presented in this case was answered by this Court in *Ellis v. Railway Clerks,* 52 U.S.L.W. 4499 (U.S. Apr. 25, 1984), and that the decision therein establishes that the ruling of the Michigan Court of Appeals in the instant case was erroneous. That contention ignores the fact that in *Ellis* this Court's rejection of a pure rebate scheme was found to violate the Railway Labor Act, not the First Amendment. Unlike the statute which this Court in *Ellis* construed as not authorizing union expenditures, over an employee's objection, of the full amount of dues paid by non-dissenting, voluntary union members, the Michigan Public Employment Relations Act explicitly sanctions agency shop agreements compelling non-union employees "to pay to the exclusive bargaining representative a service fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative." Mich. Comp. Laws § 423.210(1)(c).

Moreover, in the present case the constitutionality of the pure rebate approach (i.e., not offering the dissenter the opportunity to pay a reduced agency fee—such as might be determined by subtracting from the full dues-equivalent agency fee a pro rata share of union expenditures on political or ideological activity unrelated to collective bargaining) is not presented because Appellant was unwilling to pay even such a reduced fee to the union. As noted above, Appellant was unwilling to pay anything into an escrow account unless the union first commenced and concluded, at whatever significant litigation costs and delay, an allocation suit. Answer of Intervenor ¶ (9) (filed May 24, 1979).

On June 19, 1979, when Appellant and Appellee approved the form of the order entered by the circuit court on that date, Appellee's designation of "the appropriate amount of the agency shop fee" (J.S. App. 19a) was based on Appellee's own acknowledgment that *Abood* mandated a reduced agency fee since a portion of the agency fee to be collected by the Appellee for its affiliates, the Michigan and National Education Associations, would be spent on political or ideological activities unrelated to collective bargaining. While that effort of Appellee to reduce Appellant's agency shop fee was not based upon what a *court* had already determined to be the correct reduction (since no court had made any such allocation), the circuit court made it clear that *it* would, upon the request of the Appellant and after his payment of the requested amount to Appellee, "determine the appropriate amount of the agency shop fee pursuant to *Abood*." June 19, 1979 Order, J.S. App. 19a.

Appellant apparently contends that the reference in this Court's *Ellis* decision to "advance reduction of dues" requires that an advance reduction be calculated by a court, not by the union itself. Appellee respectfully disagrees with that contention and suggests that it is constitutionally acceptable for the advance reduction to be initially calculated by the union although subject to review, if challenged by the dissenting employee, in a state administrative agency possessing the appropriate labor expertise to apply the general pronouncements of *Abood* to specific union expenditures. In Michigan that agency is the Michigan Employment Relations Commission ("MERC"), the "administrative body having expertise in state labor matters." Brief of Intervenor Defendant-

Appellant Jibson 32 (filed August 29, 1979, in the Michigan Court of Appeals).

Appellant apparently cannot perceive any difference between (1) the "pure rebate approach," involving the union's exaction and use of *full* dues, found to constitute a *statutory* violation in *Ellis,* and (2) an approach in which the union, upon notice of the dissenter's constitutional objection, reduces the required agency fee based on its own calculation of union expenditures on political or ideological activities unrelated to collective bargaining. Thus Appellant refers (J.S. 11) to the decisions of the Michigan Court of Appeals both in the present case and in *Kempner v. Local 2077, State, County & Municipal Employees,* 126 Mich. App. 452, 459-61, 337 N.W.2d at 354, 357-58 (1983), as cases in which "lower courts saw no constitutional defect in permitting unions to use union- or agency-shop provisions as a means of obtaining forced loans to subsidize their political and ideological activities unrelated to collective bargaining."

Both the record and the discussion of the competing interests are more thoroughly set forth in the *Kempner* decisions than in the present case. Appellant has asserted that both cases sanction unconstitutional forced loans. We suggest that an examination of *Kempner* will illustrate both the nature of the constitutional contention in both cases and also the reasons why the present case does not merit plenary review by this Court.

Kempner was initially litigated before, and decided by, an administrative law judge ("ALJ") whose 1981 decision was appealed to the Michigan Employment Relations Commission which, in its 1982 affirmance of the compre-

hensive decision of the ALJ, summarized that decision as follows:

> The ALJ held that in order for a Union to lawfully demand the discharge of a nonmember for failure to pay an agency fee the Union must, after the nonmember has given notice to the Union of the fact of her objection, provide the objecting nonmember with a figure allowing him to reduce the amount of his monthly fee by the percentage of the Union's annual budget spent for ideological or political purposes unrelated to collective bargaining. In making this computation the Union may use its own definition of ideological or political purpose as long as that definition is a good faith application of current case law. After receiving this information from the Union, the objecting nonmember must commence paying a reduced fee, consisting of the normal agency fee less the percentage given him by the Union. Until the Union provides the objecting nonmember with this figure, he need pay nothing. The requirement that the objecting nonmember be allowed to pay a reduced fee was imposed by the ALJ to ensure that the nonmember need not pay, even temporarily, monies to which the Union is not entitled. If the objecting nonmember refuses to pay the reduced fee after the Union has provided him with the figure discussed above, the Union may then demand his discharge. The objecting nonmember may, of course, if dissatisfied with the figure given by the Union, pursue other remedies to obtain a final allocation of the fee. He must pay the reduced fee pending this litigation, however.
>
> 1982 Mich. Empl. Rel. Comm'n. Lab. Op. 287, 288-90 (March 11, 1982).

The Michigan Court of Appeals affirmed MERC's *Kempner* decision, and the case is presently pending before the Michigan Supreme Court on the Plaintiff's Application for Leave to Appeal. The 25-page decision and

recommended order of ALJ Sperka in *Kempner*, 1982 Mich. Empl. Rel. Comm'n. Lab. Op. 291 *et seq.*, is a carefully reasoned effort "to reconcile the cases and create a rational procedure which will protect the rights of all the parties and harmonize the decisions as much as possible." *Id.* at 309.

In addition to rejecting the dissenting employee's claim that an escrow approach is constitutionally necessary (choosing instead to compel the union to provide the employee with a reduced agency fee request), ALJ Sperka also recognized that a fair agency shop fee allocation procedure should avoid "relitigation of the same fees by different employees." *Id.* at 310. He explained that this could be accomplished by requiring only a single employee to exhaust the union's internal fee calculation procedure subject to appeal to MERC. In 1982, after ALJ Sperka's decision was affirmed by MERC, the Michigan Education Association (the state affiliate of Appellee herein) promulgated a revised policy and procedures for administering agency shop objections based on the *Kempner* decision. Appendix A. Because that policy is applicable to all of the Michigan local associations affiliated with the Michigan Education Association it will now apply to all agency shop disputes arising under contracts negotiated by Appellee. For that reason alone the *Kempner* litigation presents a far better vehicle for clarifying and approving agency shop procedures than the instant case with its sparse record and exceedingly narrow escrow issue.

However, if this Court believes its *Ellis* decision warrants immediate reconsideration by the Michigan courts of the general subject of demand and return agency fee schemes (in the light of the availability of escrow or ad-

vance reduction approaches), a remand of the present case for consideration, *inter alia,* of the Michigan Education Association's intervening adoption of the *Kempner* reduced fee approach would offer one vehicle for such reconsideration.

ALJ Sperka's concern that an agency shop procedural system should avoid relitigation of the same fees by different employees is an additional reason justifying the Michigan Court of Appeals' affirmance of the circuit court's refusal to accept Appellant's offer to pay into an escrow account only if the Association first filed an allocation lawsuit. Appellant's suggestion that the Michigan courts were constitutionally compelled to refuse to enforce the agency shop clause unless the union first filed such an allocation lawsuit, if accepted, would flood the courts with numerous lawsuits likely to end with conflicting results.

Abood teaches that the eobjective of a remedy in these cases is "to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto *without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities.*" 431 U.S. 209, 237 (1977) (emphasis added). A hypothetical illustration will demonstrate how Appellant's contention necessarily frustrates that goal. Assume that a single teacher in each of 25 Michigan school districts (whose teachers are represented by local associations affiliated with the Michigan and National Education Associations) objects to a contractual obligation to financially support his bargaining representative. Notwithstanding the long history of enforcement of union security provisions through the discharge of non-complying employees, Appellant's argument would prevent the union from

receiving any financial support whatsoever from any of those 25 unless the union finances 25 *different* allocation lawsuits of the type Appellant demanded herein—even though the expenditure information for the Michigan Education Association and the National Education Association would be the same in each case. Setting aside the significant possibility of conflicting results in those various cases,[1] it would still follow that the net effect of these expensive lawsuits would be that the union would spend far more in each suit than the amount recovered from that single objecting employee. That result would defeat not only the quoted remedy objective set forth in *Abood* but also the explicit "fair share" policy of the Michigan public-sector agency shop statute.

As evidenced by the *Kempner* decision and the Michigan Education Association's reformulation of an agency shop policy and procedures based thereon, it is apparent that significant Michigan evolution of the requirements of *Abood* has occurred since 1977. Under these circumstances we suggest that this Court's plenary review of the present case—in which Appellant's conditional escrow proposal was belatedly raised and not even briefed in the trial court by either Appellant or Appellee—would be a waste of this Court's resources. While continued clarification of the law of agency shop will ultimately be necessary, this case fails to present a substantial federal question.

———o———

[1]That problem is avoided by the "quasi 'class action' quality" inherent in the MERC approach adopted by *Kempner*. 1982 Mich. Empl. Rel. Comm'n. Lab. Op. at 310.

CONCLUSION

WHEREFORE, Appellee respectfully submits that the question upon which this cause depends is so unsubstantial as not to require further argument, and Appellee respectfully moves the Court to dismiss this appeal.

Respectfully submitted,

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APPENDIX A

Michigan Education Association Policy and Procedures Regarding Political-Ideological Expenditures

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POLICY

Upon timely objection, no individual required to pay a service fee to a local association affiliated with the Michigan Education Association (MEA) shall be required, through the payment of such a fee, to contribute to the financial support of an ideological cause or political activity unrelated to collective bargaining, contract administration, grievance adjustment and employee representation, which he/she opposes. An individual who, in compliance with the administrative procedures established by the Executive Director of Michigan Education Association (Executive Director), objects to the use of a portion of his/her service fee to support such an ideological cause or political activity shall be entitled to pay a reduced fee based upon the Executive Director's determination of the percentage of the MEA's annual budget spent for ideological or political purposes unrelated to collective bargaining, contract administration, grievance adjustment and employee representation.

ADMINISTRATIVE PROCEDURES

Section I

Objections under the policy regarding Objections to Political-Ideological Expenditures ("the policy") shall be made by giving written notice to the Executive Director of the Michigan Education Association. Notice shall be given in writing during the period of September 1 through

the 15th of each year and shall specify those causes, programs, and activities to which the individual objects, or that the individual objects to the use of a portion of her/his service fee for any political activity or ideological cause unrelated to collective bargaining, contract administration, grievance adjustment and employee representation. An objection must be renewed each fiscal year (September 1 to August 31).

Upon receipt of the objection, the Executive Director (of her/his delegate) shall determine first whether the cause, program, or activity to which the individual objects is in fact an ideological cause or political activity within the meaning of the policy. An ideological cause or political activity within the meaning of the policy is one which is unrelated to organizing, collective bargaining, contract administration, grievance adjustment or employee representation. Second, the Executive Director or her/his delegate, if she/he determines that in fact the cause, program or activity to which the individual objects is an ideological cause or political activity, shall determine the pro rata amount of the individual service fee that has been expended upon or will be expended upon such cause, activity or program. If the individual has objected to the use of a portion of her/his service fee for any political activity or ideological cause, as defined herein, the Executive Director or her/his delegate shall determine (1) the pro rata amount of the individual service fee that has been expended or will be expended on all such causes and activities and (2) the reduced fee accordingly required to be paid by the individual. Upon written request, the Executive Director or her/his delegate shall provide to the individual a copy of the approved budget for the year in question.

Section II

An individual dissatisfied with the determination of the Executive Director may appeal that determination to the Executive Committee of the Board of Directors of the Michigan Education Association. An appeal to the Executive Committee may be taken within 30 days of receipt of determination of the Executive Director. The appeal shall be taken by giving a written notice to the Executive Director of the individual's desire to appeal her/his determination to the Board of Directors. The individual, along with her/his notice of appeal, may submit to the Executive Committee such written statements and other evidence in support of her/his position as she/he deems necessary. The Executive Committee shall reach a decision upon the appeal as soon as practicable, preferably within 60 days from receipt of the appeal. If the individual is dissatisfied with the decision of the Executive Committee, she/he may further appeal by commencing, or otherwise being bound by, appropriate proceedings in the Michigan Employment Relations Commission.

Section III

These procedures apply to amounts remitted to the Michigan Education Association as well as amounts retained by the local associations affiliated with the Michigan Education Association. The local associations shall reimburse the Michigan Education Association for any amounts rebated on its behalf under the policy.

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APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

CONCLUSION 8

TABLE OF AUTHORITIES

Cases *Page*

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) 2, 3, 6, 7

Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) 7

Ellis v. Railway Clerks, 104 S. Ct. 1883 (1984) ..... *passim*

Kempner v. Local 2077, State, County & Municipal Employees, 126 Mich. App. 452, 337 N.W.2d 354 (1983), *appeal denied*, No. 72287 (Mich. Jun. 8, 1984) 3, 4

Railway Clerks v. Allen, 373 U.S. 113 (1963) 6

Robinson v. New Jersey, 547 F. Supp. 1297 (1982), *further proceedings*, 565 F. Supp. 942 (D.N.J. 1983) 4, 5, 6

School Committee v. Greenfield Education Association, 385 Mass. 70, 431 N.E.2d 180 (1982) 4, 5

Other Authorities

United States Constitution, First Amendment 7

Sup. Ct. R. 16.5 1

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On Appeal From the Court of Appeals of Michigan

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS

Pursuant to Rule 16.5 of the Rules of this Court, appellant William Jibson hereby opposes appellee's motion to dismiss this appeal.

ARGUMENT

Appellee White Cloud Education Association ("the Union") says little on the merits in its motion to dismiss. Instead, it attempts to confuse the question this appeal presents by distorting the record, asserting misleading irrelevancies, and ignoring what the lower courts actually did in this case.

The Union's primary argument is that this case presents

no substantial federal question because, it says, Mr. Jibson's "offer to pay an agency fee into escrow was conditioned on the union disavowing its own objection procedure and instead commencing a lawsuit for the purpose of proving what portion of the contractual agency fee Mr. Jibson could be required to pay." Motion to Dismiss at 3-4. This assertion is irrelevant and misleading, as the record demonstrates.

To begin with, Mr. Jibson's escrow offer was not conditioned upon the Union's filing of a separate lawsuit to prove its constitutionally chargeable costs. Both the final order of the Newaygo County Circuit Court and the decision of the Michigan Court of Appeals describe Mr. Jibson as "offering * * * to pay [the contested fee] into an escrow account pending *the circuit court's* determination of the amount thereof not used for ideological activities Jibson did not choose to support." App. A at 7a (emphasis added); *accord* App. B at 19a.[1] That determination would have been made in *this* action, which was already pending between the parties.

Moreover, the Union's internal "agency fee objection procedure" appears nowhere in the record in this case and was not even mentioned in the decisions below. It simply was not at issue. Both the trial court and the court of appeals assumed that, under *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), Mr. Jibson was entitled to a *judicial* determination of the amount of the fee that could be collected from him, but ruled that he had to pay the full disputed fee to the Union as a prerequisite to seeking such a

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[1] Appendix ("App.") references are to the appendices to the jurisdictional statement.

determination. *See* App. A at 6a-8a; App. B at 19a. As the jurisdictional statement shows, the validity of that ruling is a substantial federal constitutional question which has been foreclosed against the Union by *Ellis v. Railway Clerks*, 104 S. Ct. 1883, 1889-90 (1984).

This conclusion obtains notwithstanding that the disputed fee which Mr. Jibson was required to pay to the Union was not equal to full union dues, but was a reduced amount based upon the Union's own calculation of the proportion of a dues-equivalent fee which "would be spent on political or ideological activities unrelated to collective bargaining." Motion to Dismiss at 6. For the reduction was neither a matter of record in the trial court nor a basis for the decision of the court of appeals from which this appeal is brought. *See* App. A at 1a-2a, 6a-8a; App. B at 11a-12a, 16a-17a, 19a. Indeed, even in *Kempner v. Local 2077, State, County & Municipal Employees*, 126 Mich. App. 452, 455, 337 N.W.2d 354, 356 (1983), *appeal denied*, No. 72287 (Mich. Jun. 8, 1984), in which a union-determined reduction was a matter of record, the court of appeals did not consider it relevant to the escrow issue. Instead, the court "adopt[ed] the conclusion of *White Cloud*, that escrow accounts are *not* permitted, as more fully reflective of the United States Supreme Court's decision in *Abood*." 126 Mich. App. at 459-60, 337 N.W.2d at 357-58 (citation omitted). In short, in this case the Michigan Court of Appeals construed that state's agency-shop statute to require the payment of fees equal to full union dues as a prerequisite to litigating the constitutionality of their amount.

Even were the Union's unilateral reduction a matter of

record, the lower courts' application of the statute is still "the pure rebate approach" condemned in *Ellis*. According to the Union, a fee equal to dues would have been $240.00. Brief of Plaintiff-Appellee at 25, No. 45898 (Mich. Ct. App., filed Nov. 7, 1979). The amount which the trial court ordered Mr. Jibson to pay to the Union was $231.20. App. B at 19a. The reduction by $8.80 was an admission by the Union that it would have used at least 3.7% of Mr. Jibson's money for impermissible purposes had he not refused to pay a fee equal to dues. But the chargeability of the remaining 96.3% is still disputed and must be adjudicated. Under the decisions below, however, the Union has the use of the contested funds in the interim, and the employee's only remedy is a refund. Like the payment of interest discussed in *Ellis*, the Union's concession reduces the harm; but "[e]ven then the union obtains an involuntary loan for purposes to which the employee objects." 104 S. Ct. at 1980.[2]

In discussing the validity of the rebate approach in *Ellis*, the Court cited *School Committee v. Greenfield Education Association*, 385 Mass. 70, 431 N.E.2d 180 (1982), and *Robinson v. New Jersey*, 547 F. Supp. 1297 (D.N.J. 1982), as examples of cases "holding or suggesting that such a

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[2] The term of the involuntary loan is even longer under the scheme adopted by the Michigan Employment Relations Commission ("MERC") in *Kempner* than it is under that applied by the lower courts in this case. In *Kempner* MERC ruled that a union can make an advance reduction "'us[ing] its own definition of ideological or political purpose,'" and then an objecting employee must pay the reduced fee and "'exhaust the internal appeal procedures provided by [the Union] for challenging its allocation of the fee before requesting allocation from the Commission'." 126 Mich. App. at 456, 461, 337 N.W.2d at 356, 359. Thus, "a remand of the present case for consideration * * * of the Michigan Education Association's intervening adoption of the *Kempner* reduced fee approach," suggested by the Union, Motion to Dismiss at 10, would accomplish no purpose.

scheme does not adequately protect the rights of dissenting employees." 104 S. Ct. at 1890 n.7. In both cases, as here, the fee demanded by the union was equal to union dues minus a union-determined amount. In *Greenfield*, membership dues were $158, the service fee $153 (a 3.2% reduction); the union admitted that a portion of the fee would nonetheless be used for impermissible purposes. 385 Mass. at 73, 78, 431 N.E.2d at 183, 185.

In *Robinson*, 547 F. Supp. at 1305, 1309, the unions reduced the compulsory fees to a statutorily mandated 85% of dues, and then urged that this limitation adequately protected the rights of dissenting employees. The district court rejected this argument for reasons which apply here as well:

> There might be some merit in this contention if only expenses of the local bargaining representative were involved and if, in advance of the collection of the representation fee, there was available a detailed budget showing receipts and expenditures of the local organization. That is not the case here, however. * * * In the education association situation there are relatively modest local and county associations functioning under the umbrella of large and powerful state and national organizations. To assume that membership-only expenses and political, ideological and lobbying expenses of each of those organizations total 15% or less of pertinent total expenses requires an exercise of faith which should not be required of [non-members].

Id. at 1319.[3]

The "advance reduction of dues" to which this Court referred in *Ellis*, 104 S. Ct. at 1890, as an "acceptable alternative" to the rebate approach, was not a sham union-determined reduction. Rather, it was the "more precise advance reduction scheme" first suggested by the Court in *Railway Clerks v. Allen*, 373 U.S. 113, 122 (1963), "where [the Court] described *a 'practical decree' comprising* a refund of exacted funds in the proportion that union political expenditures bore to total union expenditures and *the reduction of future exactions by the same proportion.*" *Ellis*, 104 S. Ct. at 1889-90 (emphasis added). Unlike a reduction computed by the wrong-doer, an advance reduction determined by a court or other state tribunal is "a way of preventing compulsory subsidization of ideological activity by employees who object thereto," *Abood*, 431 U.S. at 237, that accords with due process. *See Robinson v. New Jersey*, 565 F. Supp. 942 (D.N.J. 1983).

The Union complains that it is unduly burdensome for it to have to prove the amount to which it is entitled before collecting the fee. The Court rejected this argument of "administrative convenience" in *Ellis*, 104 S. Ct. at 1890. "[A]dministrative convenience alone is insufficient to make

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[3] In this case, it is even more certain than in *Robinson* that the Union's voluntary reduction allows it to "borrow" employee funds for improper uses. The Union's agency-fee objection scheme defines "[a]n ideological cause or political activity" for which the Union makes a reduction as "one which is unrelated to *organizing*, collective bargaining, contract administration, grievance adjustment *or employee representation.*" Motion to Dismiss, Appendix A at 2a (emphasis added). Thus, the Union's criteria for a reduction on their face are narrower than *Abood* and *Ellis* require.

valid what otherwise is a violation of [individual constitutional rights]." *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 646-47 (1974). Moreover, escrow "place[s] only the slightest additional burden, if any, on the union." *Ellis*, 104 S. Ct. 1890. The Union has to litigate the fee in any case, either in this suit while the fee is escrowed, or in one subsequently brought by Mr. Jibson to obtain a refund of monies spent in violation of his first-amendment rights. *Ellis* has established that the latter approach is not an adequate alternative.[4]

The Union also half-heartedly argues that the question presented by this appeal was not properly raised below, saying that Mr. Jibson's "escrow proposal was belatedly raised and not even briefed in the trial court by either Appellant or Appellee." Motion to Dismiss at 11. "Belatedly" or not, the escrow issue was properly raised and determined in the trial court. It was asserted in Mr. Jibson's answer, and the circuit court granted his motion to intervene. Answer of Intervenor at 2 (filed May 25, 1979); App. B at 19a. The issue was orally argued when the circuit court heard the Board of Education's motion for a new trial, and that court explicitly decided the question. App. B at 18a-19a. More importantly, the escrow issue was briefed by both sides in the Michigan Court of Appeals, and the latter

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[4] While the question is not presented by this appeal, the Union's suggestion that a proceeding involving a single employee could determine what fee is constitutionally chargeable to objecting employees in different bargaining units is erroneous. The fee must be independently determined for each unit, since objecting employees may only be charged for "the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union *as exclusive representative of the employees in the bargaining unit*." *Ellis*, 104 S. Ct. at 1892 (emphasis added); *see Abood*, 431 U.S. at 231-32, 234-35.

court squarely ruled upon it in the decision from which this appeal is brought. Brief of Intervenor Defendant-Appellant William Jibson at 29-33 (filed Sept. 4, 1979); Brief of Plaintiff-Appellee at 23-31 (filed Nov. 7, 1979); App. A at 6a-8a.

CONCLUSION

Appellee's motion to dismiss is meritless. This Court should summarily reverse the decision below and grant the further relief requested in the jurisdictional statement (at 18) or, in the alternative, note probable jurisdiction and set this cause down for plenary briefing and argument.

Respectfully submitted,

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